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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARIA MAGDALENA OLARTE, individually
 and as personal representative of the Estate of
 LANCE MACLEAN, deceased,

Plaintiff,

vs.

THEODORE M. NEALE, a California resident
 and citizen, SERGEY BRIN, a California
 citizen, BAYSHORE GLOBAL
 MANAGEMENT LLC, a California limited
 liability company, GOOGLE LLC, a California
 limited liability company, SEAFly LLC, a
 California limited liability company,
 SOUTHERN CROSS AVIATION INC., and
 DOES 1 to 50, inclusive,

Defendants.

Case No.: 5:24-cv-02021
 [Assigned to Hon. Araceli Martinez-Olguin,
 Courtroom 10]

**PLAINTIFFS' REPLY TO
 DEFENDANTS' OPPOSITION TO
 MOTION TO REMAND**

Date: August 1, 2024
 Time: 2:00 pm.
 Dept.: Courtroom 10 – 19th Floor

Complaint Filed: DATE
 Removed: DATE
 Trial Date: None Set

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Defendants argue that Plaintiff must have alleged a “federal question” because the wrecked airplane drifted through the Greater Farallones Marine Sanctuary, off the coast of San Francisco, and Plaintiff has demanded that her husband’s remains, still on board, be returned to her.

According to Defendants, state law questions are thus “embedded” in a federal question by the happenstance of the drifting wreckage. Defendants are mistaken for on all points, as we explain.

I. DEFENDANTS DO NOT DEMONSTRATE THAT PLAINTIFF’S RIGHT TO RELIEF DEPENDS ON FEDERAL LAW

Defendants contend that a single sentence in the First Amended Complaint (“FAC”), the reference to duties of a shipwreck’s owner, renders the entire action subject to removal, because that sentence embeds federal law (paradoxically, Defendants also insist that those same allegations do not give rise to a viable claim for relief; in which case, this case is unassailably 100% state law.) As the Motion (DKT. 29) explained, Defendants misconstrue the allegations of the FAC and misapply the law. A reference to a federal law standard of care as part of a state law cause of action does not tether a case to a federal question, because the claim does not arise under federal law within the meaning of the Constitution. Plaintiffs do not attempt to enforce a private federal cause of action and did not embed a substantial and disputed question of federal law in this case.

A. Neither the Wreck Act Nor the National Marine Sanctuary Act Create Private Cause of Action

In *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), the Court examined the term “arising under” as used in Art. III of the Constitution. Plaintiffs there alleged that Bendectin was “misbranded” as that term is used in the Federal Food, Drug and Cosmetic Act (“FDCA”) and alleged that violations of the act created a presumption of negligence in state law tort claims. The Court first noted that the FDCA does not provide a private right of action, so it would “flout, or at least undermine, congressional intent” for a federal Court to nevertheless exercise federal question jurisdiction where there is no private cause of action in the enactment. The Court rejected contentions that: (1) a federal question is an essential element of the state law claim; (2) federal review ensures uniformity; and (3) the novelty of the case warranted federal question jurisdiction (*Id.* pp. 813-816). “[T]he presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes

1 and the federal system” (*Id.* 814). Thus, “a complaint alleging a violation of a federal statute as an
 2 element of a state cause of action, when Congress has determined that there should be no private,
 3 federal cause of action for the violation, does not state a claim ‘arising under the Constitution,
 4 laws, or treaties of the United States’” (*Id.* 817, quoting 28 *U.S.C.* §1331). The Court emphasized
 5 that restraint should be exercised when assessing federal question jurisdiction (*Id.* 810).

6 Defendants cannot and do not contend that the Wreck Act or the Rivers and Harbors Act
 7 (“RHA”)¹ (of which the Wreck Act is part) provide a private cause of action. In *California v.*
 8 *Sierra Club*, 451 U.S. 287, 297 (1981), the Court analyzed environmental claims made under the
 9 Section 10 of the RHA and held that the Act does not create a private cause of action. Since those
 10 Acts afford no private remedy, the exercise of federal-question jurisdiction here would thus
 11 undermine congressional intent, absent a compelling and “serious federal interest” (*Grable & Sons*
 12 *Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 (2005) (“*Grable*”).

13 Defendants next point to the National Marine Sanctuaries Act (“NMSA”) 16 *U.S.C.* §1431
 14 *et seq.* as a basis for federal question jurisdiction. Nowhere in that Act is there even a hint that
 15 private enforcement is contemplated; to the contrary, NMSA contemplates “enforcement actions
 16 [to be] undertaken by the Secretary [of Commerce]” (16 *U.S.C.* §1432(6), (7), and *see*, 16 *U.S.C.*
 17 §1437 (“The Secretary shall conduct such enforcement activities...”). President Clinton’s May 26,
 18 2000 Executive Order No. 13158, 65 F.R. 34909, expanded the system of protected areas while
 19 ensuring that the states were active participants in the endeavor.

20 Nowhere in the enactment or Executive Order is there reference to private enforcement.
 21 Defendants do not point to any such language anywhere in NMSA or in the decisional law. Just as
 22 is the case with the RHA, in the absence of any private cause of action, exercise of federal question
 23 jurisdiction undermines congressional (and executive) intent² (*see, e.g., W. Towboat Co. v. Vigor*

24
 25 ¹ Contrary to Defendants’ recitation at Dkt 31, p 1, Sections 15, 16, 19 and 20 of the Rivers and
 26 Harbors Act of 1899 (33 *U.S.C.* §§ 409, 411, 412, 414 and 415) are collectively known as the
 Wreck Act (*see, In re S. Scrap Material Co., LLC*, 541 F.3d 584, 585, n. 1(5th Cir. 2008)).

27 ² *Centola v. Potter*, 183 F.Supp.2d 403, 413 (D. Mass. 2002) (private cause of action on
 28 executive order requires showing that: (1) President issued the order pursuant to a statutory
 mandate or delegation of authority from Congress, with the force and effect of law; and (2) that
 the order’s terms and purpose evidenced an intent to create a private right of action – both are
 absent here).

1 *Marine, LLC*, 544 F.Supp.3d 1100, 1113 (W.D. Wash. 2021), *aff'd.*, 85 F.4th 919 (9th Cir. 2023),
 2 (United States is proper claimant for sinking of dock; private indemnity claim under NMSA when
 3 NOAA is not a party is not ripe); *see, too, Middlesex County Sewerage Auth. v. Nat'l Sea*
 4 *Clammers Assoc.*, 453 U.S. 1, 14 (1981) (“[i]n view of these elaborate enforcement provisions [of
 5 the CWA] it cannot be assumed that Congress intended to authorize by implication additional
 6 judicial remedies for private citizens suing under [the CWA]”). The NMSA would not support a
 7 private claim so the exercise of federal jurisdiction could undermine congressional intent.

8 **B. In The Absence of a Private Right of Action, Defendants Must Show a “Serious**
 9 **Federal Interest” in Claiming the Advantages Inherent in the Federal Forum**

10 Where a statutory framework provides no private cause of action, only a “special and small
 11 category” of cases can still be said to arise under the Constitution, laws or treaties of the United
 12 States. The test for federal jurisdiction over a state law claim is whether the federal issue is “(1)
 13 necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal
 14 Court without disrupting the federal-state balance approved by Congress” (*Gunn v. Minton*, 568
 15 U.S. 251, 258 (2013), quoting *Grable, supra*, 545 U.S. at 314). Only where all four requirements
 16 are met is jurisdiction proper because only then is there a serious federal interest at stake “which
 17 can be vindicated without disrupting Congress’s intended division of labor between state and
 18 federal Courts” (*Id.* 258). For *Grable* purposes, a substantial federal question would be at issue if
 19 resolution of the federal question would both be: (1) dispositive of the case and (2) controlling in
 20 numerous other cases (*see, Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700
 21 (2006)).

22 In *Gunn*, a legal malpractice claim in a patent infringement matter did not arise under
 23 federal law because, despite the need to apply federal patent law (the “case within a case”) and
 24 despite the federal issue being “actually disputed,” the federal issue was not “substantial”- that is it
 25 was not important “to the federal system as a whole” (*Id.* 261). No matter how a state Court
 26 handles the malpractice case, federal patent litigation will be unchanged. Finally, nothing about the
 27 malpractice case would undermine uniformity of patent law. State Courts can be trusted to follow
 28 federal precedent.

Defendants here cannot satisfy the four *Grable* requirements. The federal issue is not “necessarily raised” – either by the Wreck Act or NMSA because neither Act delineates Defendants’ duties to Mrs. MacLean – those duties all arise under state law. As Defendants concede, the FAC alleges only state law claims. But Defendants persist in their argument that the crash occurred in an area of “exclusive control of the federal government” (Opp. DKT. 31, p. 5). According to Defendants, that “exclusive control” translates to federal question. But, even if the federal government had “exclusive control” offshore (and it is not true for the Farallones, which are part of the City of San Francisco³) the conclusion Defendants draw would turn maritime law on its head. By Defendants’ logic, most maritime claims are federal question claims because they occur in federal territorial waters. But the law is well settled that a claim based on admiralty law does not arise under the laws of the United States within the meaning of §1331 jurisdiction (*Romero v. International Terminal Operating Co.* (1959) 358 U.S. 354; *Matter of Oswego Barge Corp.* (2d Cir. 1981) 664 F.2d 327, 338), and this is true whether the claim arose in federal or state or even international waters. The maritime location makes no difference in the federal question analysis.

Defendants go a step further, characterizing the Greater Farallones Marine Sanctuary as a pure creature of federal law that somehow also necessitates federal question jurisdiction⁴. But Defendants cannot and do not go so far as to contend that the Farallones are a federal enclave because there has been no “Cession of particular States” under Article 1, section 8, clause 17 of the United States Constitution (*see, United States v. Jenkins* 734 F.2d 1322, 1325 n. 3) (9th Cir. 1983). After the state consents, the United States must formally accept exclusive federal jurisdiction (*Id.*, 1325 n. 3). While “enclave jurisdiction” applies to military bases, federal Courthouses and other federally acquired properties, a marine sanctuary is not so “owned.” In *Murfey v. Spiders Aircraft Serv., Inc.*, 2006 WL 8455427, at *1–3 (S.D. Cal. May 5, 2006) a removing defendant unsuccessfully made similar allegations following an airplane crash in Boise National Forest.

³ California Dept. of Fish & Wildlife, <https://cdfwmarine.wordpress.com/2016/04/04/exploring-californias-marine-protected-areas-the-farallon-islands/>, last visited May 20, 2024.

⁴ Plaintiff objects to Defendants’ introduction of evidence in its opposition; the Motion to Remand made a facial challenge to removal, not a factual one inviting counter-evidence. Defendants’ reliance on *Leite v. Crane Co.*, 749 F.3d 1117 (2014) is thus misplaced.

1 Defendant did not show that the property had been ceded to the United States as an enclave and did
2 could not show that in establishing the National Forest, the federal government reserved
3 jurisdiction to itself; it did not do so there, and it did not do so here, either.

4 The Islands are part of a nature sanctuary jointly protected by the State of California
5 Department of Fish & Wildlife and the U.S. Dept. of Commerce, where the site is co-administered
6 by NOAA. In designating the Farallons as a marine sanctuary Congress specifically left intact
7 California's Fish & Game Code and Fishery Management Plans, among other things, Fed. Reg.
8 Vol 73, No. 225 at 70490, for instance. The Sanctuary protects sea life through a cooperative effort
9 between California and its federal partners at NOAA. The enacting legislation, 16 USC §1431, for
10 instance identifies as a "purpose and policy" "(b)(7) to develop and implement coordinated plans
11 for the protection and management of these areas with appropriate Federal agencies, State and
12 local governments..." – not the "exclusive" federal governance Defendants contend is in place.
13 Executive Order No. 13158, May 26, 2020, 65 F.R. 34909, goes to great lengths to describe a
14 concurrent system, defining "Marine protected area" as "any area of the marine environment that
15 has been reserved by Federal, State, territorial, tribal, or local laws..." and goes on to describe the
16 expected coordination between federal and state agencies. That Executive Order concludes: "(a)
17 Nothing in this order shall be construed as altering existing authorities regarding the establishment
18 of Federal MPAs in areas of the marine environment subject to the jurisdiction and control of
19 States..." State agencies and resources are expressly to be part of the enforcement mechanisms:
20 "(h) Use of resources of State and other Federal agencies: The Secretary shall, whenever
21 appropriate, use by agreement the personnel, services, and facilities of State and other Federal
22 departments, agencies, and instrumentalities, on a reimbursable or non-reimbursable basis, to carry
23 out the Secretary's responsibilities under this section" (*Id.*).

24 It naturally follows that because responsibility for the Sanctuary was shared, there is no
25 exclusive federal jurisdiction. No question to be decided in this case implicates a purely federal or
26 congressional concern; to the contrary, California is more profoundly affected by the inevitable
27 coastal damage than is the federal government. It is telling that Defendants can point to no term or
28 provision of the NMSA or RHA that is essential to the wrongful death and conversion claims; only

1 that Defendants might disturb the seabed if they *did* actually recover the wreckage. This doesn't
 2 implicate a substantial interest under federal law likely to disrupt the federal-state balance
 3 approved by Congress within the meaning of *Grable*, any more than do the extensive
 4 environmental litigation discussed in *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th
 5 Cir. 2022) and *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020). Federal law is not an
 6 essential element of the nuisance claims in those cases, and it is not an essential element of what
 7 Defendants correctly describe as a state law wrongful death claim. Mr. MacLean didn't die
 8 because of a violation of the NMSA or RHA; even if federal law were an essential element of a
 9 state law claim (which it is not), the claim is not removeable (*Wander v. Kaus*, 304 F.3d 856 (9th
 10 Cir. 2002) (violation of ADA as element of state claim does not confer federal-question
 11 jurisdiction); *Martinez v. Del Taco, Inc.*, 252 F.App'x 148, 149 (9th Cir. 2007) (same); *Ilczyszyn v.*
 12 *Sw. Airlines Co.*, 2015 WL 5157372, at *1 (N.D. Cal. Sept. 1, 2015) (wrongful death claim
 13 implicating TSA regulations does not create federal-question jurisdiction).

14 Even if the state Court is required to interpret federal law, that is not enough to raise a
 15 substantial federal issue (*Victoria v. Metro. Life Ins.*, 2010 WL 583946, at *1 (N.D. Cal. Feb. 16,
 16 2010) (citing *Civil Procedure Before Trial* (Rutter Group) at 2:108). This is so because a federal
 17 issue within the meaning of *Grable* is one that involves a dispute regarding "the validity,
 18 construction or effect of federal law" (*Grable*, 545 U.S. at 313 (quoting *Shulthis v. McDougal*, 225
 19 U.S. 561, 569 (1912)) (internal brackets omitted)). Here, no federal issue would be dispositive of
 20 the case or controlling on other cases (*Empire HealthChoice Assurance, Inc. v. McVeigh, supra*,
 21 547 U.S. at 700).

22 Defendants identify no such substantial federal issue and point to no law for the proposition
 23 that the Wreck Act or the RHA create one. *Michigan Dep't of Env't, Great Lakes, & Energy v.*
 24 *Mueller* 2020 WL 12698601, at *2 (W.D. Mich. June 15, 2020), cited by defendants, does not so
 25 hold; there, defendant was licensed by and regulated by the Federal Energy Regulatory Committee,
 26 and when defendant's dam collapsed, catastrophic damage followed. The Federal Power Act
 27 preempts state law, occupying the whole field. This case thus falls within that narrow exception to
 28 the well-pleaded complaint doctrine where a federal statute's force is so great the it preempts state

1 law. The Federal Power Act, not the RHA, was the statute that held that force.

2 Other cases cited by Defendants do not assist them. In *Merrill Lynch, Pierce, Fenner &*
 3 *Smith, Inc. v. Manning*, 578 U.S. 374 (2016), an investor sued the brokers for market misconduct
 4 and the Court held that the Securities Exchange Act of 1934 expressly granted federal courts
 5 exclusive jurisdiction of suits to enforce duties under the Act. No such grant appears in the RHA or
 6 NMSA. *Mitchell v. Advanced HCS, LLC*, 28 F.4th 580 (5th Cir. 2022) held that federal law, the
 7 Covid-19 PREP Act, did *not* preempt state law claims against nursing home and the case was
 8 remanded. In *Bd. of Commissioners of Se. Louisiana Flood Prot. Auth.-E. v. Tennessee Gas*
 9 *Pipeline Co., L.L.C.*, 850 F.3d 714, 722 (5th Cir. 2017), the federal levee system was exclusively a
 10 creature of federal law with no state court counterpart for the asserted claims so federal jurisdiction
 11 was appropriate. These cases do not support Defendants' contentions.

12 C. **When Confronting Plaintiff's Alternative Argument That the Court Should**
 13 **Not Exercise Supplemental Jurisdiction Over State Law Claims That Arise**
 14 **Out of Defendants' Pre-Accident Negligence, Defendants Do not Even Argue**
That There is a "Common Nucleus of Operative Fact"

15 Defendants ignore completely Supreme Court precedent requiring that state law claims
 16 "derive from a common nucleus of operative fact" to warrant the exercise of supplemental
 17 jurisdiction (*United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966))("The state and
 18 federal claims must derive from a common nucleus of operative fact."); *see also, Bahrapour v.*
 19 *Lampert*, 356 F.3d 969, 978 (9th Cir. 2004) ("A state law claim is part of the same case or
 20 controversy when it shares a 'common nucleus of operative fact' with the federal claims and the
 21 state and federal claims would normally be tried together."). Defendants do not even mention this
 22 legal requirement for the exercise of supplemental jurisdiction, much less attempt to meet it.

23 The causes of action arising out of the pre-accident conduct that led to Mr. Mclean's death
 24 do not derive from a common nucleus of operative fact with the causes of action arising out of
 25 Defendants' post-accident failure to recover Mr. Mclean's body. Courts have held that "there is no
 26 common nucleus of operative fact if there is no evidentiary overlap whatsoever between the
 27 claims" (*Jiangong Lei v. City of Lynden*, 2014 WL 6611382, *4, (W.D. Wash. Nov. 20, 2014)).
 28 The evidence with respect to the pre-accident failures that led to Mr. McLean's death is entirely

1 distinct from the evidence relating to Defendant's failure to recover his body.

2 Instructive on this topic is *Carne v. Stanislaus Cnty. Animal Services Agency*, 445
3 F.Supp.3d 772, 775 (E.D. Cal. 2020). There:

4 [t]he conduct that gives rise to the state law claims is the Stanislaus Shelter's
5 alleged mistreatment of animals. The conduct that gives rise to the federal claims
6 is the Stanislaus Shelter's attempts to stop Plaintiffs when they tried to document
and publicize that alleged mistreatment." (*Id.*)

7 In other words, these are two causes of action against the same defendant: one arising from the
8 mistreatment of animals and one arising from post-animal-mistreatment conduct. The Court found
9 it did not have subject matter jurisdiction over the state law claims, explaining that although
10 "[t]here is some causal link between these two clumps of actions" because "Plaintiffs sought to
11 videotape inside the Stanislaus Shelter because of the alleged mistreatment," "[t]he evidence that
12 pertains to the state law claims focuses on the Stanislaus Shelter's treatment of animals[,]. . .
13 [while] [t]he evidence related to the federal claim focuses on the attempt to film inside the
14 Stanislaus Shelter, calls to the police about harassment, and a threat to cut off access to an email
15 list" (*Id.*). Accordingly, the Court found "[t]here is minimal overlap of evidence between the two"
16 (*Id.*).

17 Importantly, the *Carne* Court emphasized that the defendants' actions that underlie each of
18 the claims were different, and thus "there is no common nucleus" despite some evidentiary overlap
19 (*see, Id.*). So too here. Defendants only weakly gesture at evidentiary overlap between the pre-
20 accident and post-accident causes of action. They say the three causes of action are all "predicated
21 on the location of the decedent's remains[.]" (DKT. 31 at 20). But Plaintiffs' causes of action for
22 wrongful death are not "predicated" on the location of remains; they are predicated on the
23 Defendants' actions that caused Mr. Mclean's death. Defendants in *Carne* tried a similar tactic,
24 arguing that the claims were all predicated on the mistreated animals. There, the Court correctly
25 found that this was not enough. The correct analysis focuses on "the actions that underlie" the
26 claims (*Carne*, 445 F.Supp.3d 775). Here, as in *Carne*, the actions underlying the pre-accident and
27 post-accident claims are factually and temporally distinct. If the Court chooses to exercise
28 jurisdiction over post-accident claims, it should sever and remand claims arising from Defendant's

1 pre-accident conduct.

2 **II. CONCLUSION**

3 These cases raise state law claims that belong in state court where they were originally
4 brought. Plaintiff respectfully requests that the matter be remanded to the Superior Court.

5
6 Dated: May 23, 2024

ENGSTROM, LIPSCOMB & LACK

7 By: /s/ Elizabeth L. Crooke
8 ELIZABETH L. CROOKE, ESQ.
9 STEVEN J. LIPSCOMB, ESQ.
Attorneys for Plaintiff

10 Dated: May 23, 2024

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CERTIFICATE OF WORD COUNT

I certify that the accompanying **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION TO REMAND**, which was prepared using Times New Roman 12-point typeface, contains 3,556 words, excluding the title page, signature lines, this Certificate, and Certificate of Service. This certificate was prepared in reliance on the word count function of the word-processing system (Microsoft Word) used to prepare the document.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 23, 2024

ENGSTROM, LIPSCOMB & LACK

By: /s/ Elizabeth L. Crooke
ELIZABETH L. CROOKE, ESQ.
STEVEN J. LIPSCOMB, ESQ.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2024, a true and correct copy of **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION TO REMAND** was served electronically to all parties with an email address on record who have consented to electronic service in this action.

/s/ Erin Stover
ERIN STOVER